

These are the tentative rulings for civil law and motion matters set for Tuesday, March 29, 2011, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, March 28, 2011. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense. Pursuant to Local Rule 20.2.3(A), oral argument shall not exceed 5 minutes per side.

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**EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MARGARET E. WELLS AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.**

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1. M-CV-0046503 First National Bank of Omaha vs. Weber, Wilhelm J.

Appearance required for hearing. Plaintiff's attorney may appear by telephone. The court will contact counsel when the matter is called for hearing.

Plaintiff's motion to deem requests for admission admitted is granted. The requests for admission served August 3, 2010, are deemed admitted. Plaintiff's motion to compel responses to form interrogatories is granted. Verified responses, without objections, shall be served by April 29, 2011.

Sanctions are awarded to plaintiff in the amount of \$175.

2. S-CV-0023965 AcuSport Corporation vs. Renda, Jennene et al

The motion has been dropped for lack of moving papers.

3. S-CV-0024664 Bandy, Michael Isaac vs. Kobra Associates, Inc.

Plaintiff's motion for sanctions is denied.

There is no evidence that defendant "willfully" or "intentionally" destroyed the video recording in anticipation of a discovery request or after a discovery request. The evidence presented indicates that the video was simply recorded over in the normal business process at least a month before even an informal request to preserve it was made, and several months before the complaint was filed or any formal request for production was made.

Per CCP § 2031.300(d)(1) "Absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as a result of the

routine, good faith operation of an electronic information system.” There is no indication defendants operated their system in “bad faith.” Therefore, both terminating sanctions and striking the testimony of defendant’s expert witnesses are denied. Defendant’s actions have not made it practically impossible for the plaintiff to prove the wrongdoing. Sanctions are not proper at this time.

4. S-CV-0024703 Doug Gray Const. & Drywall, Inc. vs. Jungers, Randall O.

Plaintiff Doug Gray Construction's motion for a protective order is denied. Each request for admission specifically addresses one of the many items identified as construction defects in the two expert reports provided by defendant Jungers. Per CCP 2033.220(b), the responding party shall (1) admit so much of the matter as is true, (2) deny so much as is untrue, and (3) specify so much of the matter as to which the responding party lacks sufficient information and knowledge.

Plaintiff shall serve verified responses, without objections, by April 29, 2011.

Both parties' requests for monetary sanctions are denied, per CCP 2033.080(d). Frankly, the court is appalled by the childish and unprofessional demeanor displayed by both attorneys in the correspondence attached to the motion and the opposition. "It is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law. Unwarranted personal attacks on the character or motives of the opposing party, counsel, or witnesses are inappropriate and may constitute misconduct.” (People v. Chong (1999) 76 Cal.App.4th 232, 243; In re S.C. (2006) 138 Cal.App.4th 396, 412.)

Plaintiff's request for sanctions is denied on the additional ground that sanctions were not requested in the notice of motion, as required by CCP 2023.040.

5. S-CV-0025947 America California Bank vs. Topol, Nathan L. et al

Cross-defendant America California Bank's (Bank) motion to strike the 2d amended cross-complaint (SACC) of cross-complainant Homewood Marina is granted without leave to amend.

On November 2, 2010, the court sustained Bank's demurrer to the first amended cross-complaint with leave to amend as to the causes of action for intentional and negligent interference with economic relations, breach of good faith covenant, and RICO violations. The court did not grant leave to add additional causes of action. Leave to amend a complaint does not allow a plaintiff to add new causes of action unless the new cause of action directly responds to the court's reasons for sustaining the demurrer. Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995. In the present case, the new causes of action alleged - negligent disbursement of loan funds, declaratory relief, cancellation of written instruments, and quiet title - do not address any of the court's reasons for sustaining the prior demurrer.

In addition, the motion to strike is granted without leave to amend as to the request for bad faith damages in the prayer for relief re the breach of contract cause of action. No cause of action for breach of good faith covenant is stated in the SACC.

Alternatively, Bank's demurrer to the SACC is sustained without leave to amend.

With respect to the 2d cause of action for negligent disbursement of loan funds, the gist of this cause of action is that the Bank did not disburse funds; therefore a claim of "negligent disbursement" is contradictory. Moreover, there are no tort duties between a borrower and a lender. *Nymark v. Heart Fed. S & L* (1991) 231 Cal. App. 3d 1089.

With respect to the 3d cause of action for declaratory relief, such a cause of action is not appropriate to address past wrongs. Moreover, no facts are alleged to show how Bank had an obligation to provide notice of default or notice of sale to West Shore when that entity did not obtain title to the property until after those documents were recorded. In any case, if there was any such obligation, it was owed to West Shore, and Homewood has no standing to assert West Shore's claims.

With respect to the 4th and 5th causes of action for cancellation of written instruments and quiet title, the SACC is insufficient in that it fails to allege that Homewood tendered or had the ability to tender the full amount due. *Abdallah v. United Savings Bank* (1996) 43 Cal. App. 4th 1101.

The Bank's request for judicial notice is granted.

6. S-CV-0026551 First National Ins. Co. vs. County of Placer

The motion of Sedgwick, Detert, Moran & Arnold to withdraw as attorney of record for defendant Maxim Construction, Inc., dba Nevada Maxim Construction, Inc., is denied without prejudice. There is no proof of service in the court's file of the ex parte order setting the March 29 hearing date. Per the ex parte order, the order was to be served by March 11 and proof of service was to be filed by March 21.

7. S-CV-0027281 Smith, William, et al vs. Fremont Reorganizing Corp., et al

The demurrers of defendants OCWEN Loan Servicing, LLC, Litton Loan Servicing LP, and Quality Loan Service Corporation to Plaintiffs' amended complaint are sustained with leave to amend.

The first and second causes of action lack the facts and specificity required for a fraud claim. Plaintiffs do not say who, on behalf of these defendants, said anything, the authority of the persons to speak, to whom they spoke, when they spoke, etc. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) Plaintiffs also fail to explain how they were damaged by having to pay amounts they admit they owed on the loans to the loan servicers. There is also no basis for the accounting that plaintiffs request; there is no fiduciary relationship between the parties, and any amounts due to plaintiffs can be determined without a formal accounting. (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 14; *Nymark v. Heart Fed. Savings & Loan Assn* (1991) 231 Cal.App.3d 1089, 1095.)

With respect to the 8th cause of action, possession of the original promissory note is not a prerequisite to initiating foreclosure. (*Gamboa v. Ndex West, LLC* (E.D. Cal. 2008) 2008 WL 5382259). Furthermore, MERS is a legitimate beneficiary with all applicable rights and powers both by law (*Derakshan v. Mortgage Electronic Registration Systems, Inc., et al.*, 2009 U.S. Dist. LEXIS 63176 (C.D. Cal.); *Gomes v. Countrywide Home Loans* (2/18/11) 2011 DJDAR 2681) and per the parties' deed of trust. It is exempt from registration in California. (*Lomboy v. SCME Mortgage Bankers*, 2009 U.S. Dist.

LEXIS 44158 (N.D. Cal. 2009).) A trustee recording a notice of default also incurs no liability if it acts in good faith. (CC 2924(b).) Commercial Code 3301 is inapplicable because CC 2924 et seq. govern non-judicial foreclosures in California. (I.E. Assocs. v. Safeco Title Ins. Co. (1985) 39 Cal.3d 281, 285, 288.) Finally, Quality was not required to produce the original note. (Farner v. Countrywide, 2009 U.S. Dist. LEXIS 5303; Gallegos v. Recontrust Co., 2009 U.S. Dist. LEXIS 215406).)

The 9th claim for relief does not state a cause of action because CRLA does not apply to residential loan transactions. (CC 1770; McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1488.) The issuance of credit is also not “goods.” (Berry v. American Exp. Pub., Inc. (2007) 147 Cal.App.4th 224, 233.) Furthermore Litton’s judicial notice request shows Litton followed the procedures prescribed by CC 2924 et seq.

The 11th claim for relief fails to state a cause of action because Plaintiffs fail to allege facts showing how defendants engaged in unfair business practices, or specific amounts of money allegedly lost, or how any money lost is related to the amended complaint’s allegations, i.e., they fail to show injury in fact. The alleged violations are not pleaded with the required particularity. (Khoury v. Maly’s of California, Inc. (1993) 14 Cal.App.4th 612, 619.) Plaintiffs fail to establish any wrongful act by defendants in violation of B&P 17200. (Walker v. Countrywide Home Loans, Inc. (2002) 98 Cal.App.4th 1158, 1169.) Also, Plaintiffs lack standing to seek relief under B&P Code 17200 because they cannot show they have lost money or property. (Proposition 64; Branick v. Downey Savings & Loan Assn. (2006) 39 Cal.4th 235, 241.)

Finally, Plaintiffs have filed opposition only to Quality’s demurrer, and then only with respect to the 8th cause of action for wrongful foreclosure. The only specific opposing argument is that Quality’s Declaration of Nonmonetary Status “[does not state] any facts to support the allegation it cannot require the Beneficiary of the Deed of Trust to produce the Note.” The objection is meritless.

Defendants’ respective requests for judicial notice are granted. Plaintiffs’ request for judicial notice is denied.

In light of the foregoing rulings, defendants’ motions to strike are dropped as moot.

Plaintiffs shall serve and file any amended complaint by April 22, 2011.

The request of counsel for Quality Loan Service Corporation to appear telephonically is granted. If oral argument is requested, the court will contact counsel when the matter is called for hearing.

8. S-CV-0027662 A.E., et al vs. International Church - Foursquare Gospel, et

The joint motion of plaintiff and defendants for court order authorizing release of records is granted in part.

The City shall release to the parties copies of all documents referred to in defendants’ subpoena dated September 24, 2010, and all documents referred to in plaintiff’s subpoena dated October 12, 2010. However, the City shall not be required to produce any other evidence, or any investigative material, or any tangible, physical evidence to the parties. Plaintiff and defendants shall pay all costs of the copying, each side paying 1/2 of the cost.

In addition, a protective order is issued in accord with the terms of paragraphs 2 through 18 of the proposed order submitted as Exhibit H to the motion. Counsel shall prepare and submit to the court a formal written order re production in accordance with this ruling, and a formal written protective order in accordance with this ruling.

9. S-CV-0028275 Barr, Robert, et al vs. Collins, Melinda, et al

The demurrer has been dropped as a consequence of the stipulation of the parties.

10. S-CV-0028541 Millenium Health & Wellness Center Inc v Richardson, Paul et al

This tentative ruling is issued by the Honorable Colleen M. Nichols.

Appearance required for hearing. Hearing will be held on March 29, 2011 at 8:30 a.m. in Department 32 of the Placer County Superior Court in Roseville, California.

This case has been consolidated with case number S-CV-0028675, City of Roseville v. Millenium Health & Wellness Center Inc. Case S-CV- 0028541 shall be the lead case.

11. S-CV-0028547 People of the State of California vs. Roseville Compassionate

This tentative ruling is issued by the Honorable Colleen M. Nichols.

Appearance required for hearing. Hearing will be held on March 29, 2011 at 8:30 a.m. in Department 32 of the Placer County Superior Court in Roseville, California.

12. S-CV-0028675 City of Roseville, et al vs. Millenium Health & Wellness Center

This tentative ruling is issued by the Honorable Colleen M. Nichols.

Appearance required for hearing. Hearing will be held on March 29, 2011 at 8:30 a.m. in Department 32 of the Placer County Superior Court in Roseville, California.

This case has been consolidated with case number S-CV- 0028541, Millenium Health & Wellness Center Inc v Richardson. Case S-CV- 0028541 shall be the lead case.

13. T-CV-0001685 Gold, Damon, et al vs. Bank of America, N.A., et al

Plaintiffs' application for preliminary injunction is denied.

Plaintiffs have not demonstrated the likelihood of success on the merits. They have not alleged tender, or the ability to tender, the full amount due, as required by *Alicea v. GE Money Bank*, Case no. C 09-00091 SBA, s009 WL 2136969 (N.D. Cal. 7/16/09); *Karlsen v. American Savings & Loan* (1971) 15 Cal. App. 3d 112; *Abdallah v. United Savings Bank* (1996) 43 Cal. App. 4th 1101.

Moreover, California law does not require the production of the original note. *Moeller v. Lien* (1994) 25 Cal. App. 4th 822. California non-judicial foreclosure statutes do not require it. *I.E. Associates v. Safeco Title Ins.* (1985) 39 Cal. 3d 281. The

beneficiary of a deed of trust may make a substitution of trustee. The new trustee may record the notice of default before the substitution of trustee is recorded, as long as the substitution is recorded prior to sale. CC 2934a(b).

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**This concludes the tentative rulings for civil law and motion matters set for Tuesday, March 29, 2011, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, March 28, 2011. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense. Pursuant to Local Rule 20.2.3(A), oral argument shall not exceed 5 minutes per side.**